IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 2.11.2006

CORAM

THE HON'BLE MR.JUSTICE P.D.DINAKARAN
AND
THE HON'BLE MR.JUSTICE P.P.S.JANARTHANA RAJA

T.C.(A) No.2581 of 2006

Commissioner of Income Tax
Madurai. .. Appellant /Respondent

Vs.

M/s.Mepco Industries Limited,
Madurai. .. Respondent /Applicant

Appeal under Section 260A of the Income Tax Act, 1961 against the order of the Income Tax Appellate Tribunal, Madras 'C' Bench dated 25.11.2005 in ITA Nos.1901/Mds/2003, for the assessment year 1999-2000 against the order of Commissioner of Income tax-II, Madurai dt. 2.9.03 in Proceedings No.C.No. 401/2003-04/CIT/I for the assessment year 1999-2000 against the assessment order dt. 29.1.02 PA 49-003-CX-6668 on the file of the Deputy Commissioner of INcome-tax company circle I, Madurai for the assessment year 1999-2000.

For Appellant : Mr.J.narayanasamy, Jr. SC. For IT

J U D G M E N T

(Delivered by P.D.DINAKARAN, J.)

The above tax case appeal is directed against the order of the Income-tax Appellate Tribunal dated 25.11.2005 made in ITA Nos.1901/Mds/2003 for the assessment year 1999-2000 and the following substantial questions of law have been raised for consideration:

1. Whether in the facts and circumstances of the case, the Tribunal was right in holding that the order under section 263 is ambivalent as to whether the order is erroneous and prejudicial or not merely because the CIT sent back the matter to the assessing officer to pass fresh orders after giving opportunity to the assessee?

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2. Whether in the facts and circumstances of the case, an order of revision under section 263 should come to a final conclusion and should not remit the matter to the assessing officer?

2. The brief facts of the case, as stated, are as follows:-

2.1. The relevant assessment year with which we are concerned is 1999-2000. The assessee company filed its return of income admitting the income of Rs.39,36,400/-. The return was processed under section 143(1)(a) of the Income-tax Act, 1961 (hereinafter referred to as 'the Act'). The case of assessee was selected for scrutiny, notice under section 143(2) of the Act was issued and after hearing the assessee, the assessment was completed accepting the return filed by the assessee.

2.2. The Commissioner of Income-tax, finding that inter-unit loss was not adjusted against the profit for the purpose of allowing deduction under section 80 IA of the Act, issued a notice under section 263 of the Act to the assessee. The assessee objected to the same contending that as per the provisions of section 80 AB of the Act, the only rider is that the deductions contemplated under Chapter VIA cannot be carried forward to succeeding years and the quantum of deduction shall be computed as if such eligible business is the only source of income of the assessee and hence, section 80 AB of the Act will not restrict the relief under section 80 IA of the Act.

2.3. The Commissioner of Income-tax, considering the objection raised by the assessee, remitted the matter to the assessing officer for fresh assessment. The relevant portion of the order of the Commissioner of Income-tax dated 2.9.2003 reads as under:

> " It would appear that since the issues raised before me by the CA have not been considered at any stage by the assessing officer, the matter has to go back to him for appropriate adjudication as per law. The assessing officer should give fresh opportunity to the assessee before restricting the claim of the assessee u/s.80 IA by relying upon the decisions of the Hon'ble Supreme Court and the High Court in 224 ITR 604 and 245 ITR 605 and he should also duly weigh the averments of the assessee in the matter. The assessing officer should pass fresh assessment order with regard to the issue of disallowing the excess claim of the deduction under Sec.80 IA which works out to Rs.3581202."

2.4. Exasperated by the said order of Commissioner of Income-tax, the assessee preferred an appeal before the Appellate Tribunal, which, by order dated 25.11.2005, following the unreported judgment of this Court in Commissioner of Income-tax v. Smt.D.Valliammal dated 27.6.1996, set aside the order of Commissioner of Income-tax holding that the Commissioner of Income-tax has committed an error in invoking the jurisdiction under section 263 of the Act. Hence, the present appeal by the Revenue raising the questions of law referred to above.

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3. Both the questions, in our considered opinion, revolve on the power of the Commissioner of Income-tax in invoking jurisdiction under section 263 of the Act which reads as follows:

"263. Revision of orders prejudicial to revenue.--(1) The Commissioner may call for and examine the record of any proceeding under this Act, and if he considers that any order passed therein by the Assessing Officer is erroneous in so far as it is prejudicial to the interests of the revenue, he may, after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment, or cancelling the assessment and directing a fresh assessment.

Explanation.--For the removal of doubts, it is hereby declared that, for the purposes of this sub-section,--

(a) an order passed on or before or after the 1st day of June, 1988, by the Assessing Officer shall include--

(i) an order of assessment made by the Assistant Commissioner *or Deputy Commissioner or the Income-tax Officer on the basis off the directions issued by the *Joint Commissioner under section 144A ;

(ii) an order made by the *Joint Commissioner in exercise of the powers or in the performance of the functions of an Assessing Officer conferred on, or assigned to him under the orders or directions issued by the Board or by the Chief Commissioner or Director General or Commissioner authorised by the Board in this behalf under section 120 ;

(b) "record" shall include and shall be deemed always to have included all records relating to any proceeding under this Act available at the time of examination by the Commissioner ;

(c) where any order referred to in this sub-section and passed by the Assessing Officer had been the subject matter of any appeal, filed on or before or after the 1st day of June, 1988 the powers of the Commissioner under this sub-section shall extend and shall be deemed always to have extended to such matters as had not been considered and decided in such appeal.

(2) No order shall be made under sub-section (1) after the expiry of two years from the end of the financial year in

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which the order sought to be revised was passed.

(3) Notwithstanding anything contained in sub-section (2), an order in revision under this section may be passed at any time in the case of an order which has been passed in consequence of, or to give effect to, any finding or direction contained in an order of the Appellate Tribunal, the High Court or the Supreme Court.

Explanation.--In computing the period of limitation for the purposes of sub-section (2), the time taken in giving an opportunity to the assessee to be re-heard under the proviso to section 129 and any period during which any proceeding under this section is stayed by an order or injunction of any court shall be excluded."

4. The Apex Court in Malabar Industrial Co. Ltd. v. C.I.T. (243 ITR 83), after considering the power and jurisdiction of Commissioner of Income-tax under section 263 of the Act and the meaning of the phrase, 'prejudicial to the Revenue' found in section 263 of the Act, held as follows:

"A bare reading of section 263 of the Income-tax Act, 1961, makes it clear that the prerequisite for the exercise of jurisdiction by the Commissioner suo motu under it, is that the order of the Income-tax Officer is erroneous in so far as it is prejudicial to the interests of the Revenue. The Commissioner has to be satisfied of twin conditions, namely, (i) the order of the Assessing Officer sought to be revised is erroneous; and (ii) it is prejudicial to the interests of the Revenue. If one of them is absent-if the order of the Income-tax Officer is erroneous but is not prejudicial to the Revenue or if it is not erroneous but is prejudicial to the Revenue-recourse cannot be had to section 263(1) of the Act. The provision cannot be invoked to correct each and every type of mistake or error committed by the Assessing Officer, it is only when an order is erroneous that the section will be attracted. An incorrect assumption of facts or an incorrect application of law will satisfy the requirement of the order being erroneous. In the same category fall orders passed without applying the principles of natural justice or without application of mind. The phrase "prejudicial to the interests of the Revenue" is not an expression of art and is not defined in the Act. Understood in its ordinary meaning it is of wide import and is not confined to loss of tax. The scheme of the Act is to levy and collect tax in accordance with the provisions of the Act and this task is entrusted to the Revenue. If due to an erroneous order of the Income-tax

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Officer, the Revenue is losing tax lawfully payable by a person, it will certainly be prejudicial to the interests of the Revenue. The phrase "prejudicial to the interests of the Revenue" has to be read in conjunction with an erroneous order passed by the Assessing Officer. Every loss of revenue as a consequence of an order of the Assessing Officer, cannot be treated as prejudicial to the interests of the Revenue, for example, when an Income-tax Officer adopted one of the courses permissible in law and it has resulted in loss of revenue, or where two views are possible and the Income-tax Officer has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interests of the Revenue unless the view taken by the Income-tax Officer is unsustainable in law.

(Emphasis supplied)

5. As held by the Apex Court in Malabar Industrial Co. Ltd. Case, cited supra, every loss of revenue as a consequence of an order of the Assessing Officer, cannot be treated as prejudicial to the interests of the Revenue, for example, when an Income-tax Officer adopted one of the courses permissible in law and it has resulted in loss of revenue, or where two views are possible and the Income-tax Officer has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interests of the Revenue unless the view taken by the Income-tax Officer is unsustainable in law.

6. In the instant case, the Commissioner of Income-tax, while exercising power under Section 263 of the Act, had not rendered an independent finding to the effect that the course adopted by the assessing officer is neither permissible, nor the view taken by the assessing officer resulted in the loss of revenue which is prejudicial to the interest of the Revenue. In the absence of any such finding, the Appellate Tribunal, in our considered opinion, is right in setting aside the order of the Commissioner of Income-tax.

7. Even on merits, on the point that inter-unit loss was not adjusted against the profit for the purpose of allowing deduction under section 80 IA of the Act, there are two views possible; one in favour of the Revenue and the other in favour of the assessee.

(i) In favour of the Revenue:

(a) Kotagiri Industrial Co-operative Tea Factory Ltd. (224 ITR 604)

In this case, the Supreme Court, while interpreting the expression, 'gross total income' in clause (5) of section 80B of the Act for the purpose of Chapter VI-A of the Act, held that it is necessary, for the purpose of making deduction under section 80P of the Act, to determine the gross total income in accordance with the other provisions of the Act, which means that the gross total income must be determined by setting off against the income the

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business losses of the earlier years as required under section 72 of the Act, before allowing deduction under section 80P.

(b) C.I.T. v. Sundaravel Match Industries (P) Ltd. (245 ITR 605)

In this case, this Court held that losses should be set off against the profits of the industrial undertaking before granting the deduction under section 80HH of the Income-tax Act, 1961, in view of the specific provision found in section 80AB of the Act.

(ii) in favour of the assessee:

Canara Workshops P. Ltd. (161 ITR 320)

In this case, the Apex Court held that in the application of section 80E of the Income-tax Act, 1961, the profits and gains earned by one priority industry (mentioned in that section) cannot be reduced by the loss suffered by any other industry or industries owned by the assessee.

8. Therefore, on the facts of the case, when there are two views are possible and it is not the case of the Revenue that the view taken by the assessing officer is not permissible in law, the Commissioner of Income-tax is not justified in invoking the jurisdiction under section 263 of the Act.

9. Hence, we do not find any question of law, much less a substantial question of law that arises out of the order of the Appellate Tribunal. Accordingly, the tax case appeal stands dismissed. No costs.

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Sd/
Asst. Registrar

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Sub Asst.Registrar

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To

1.The Assistant Registrar,
Income Tax Appellate Tribunal,
III Floor, Besant Nagar, Rajaji bhavan,
Madras Bench "C"., Madras-90.

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2.The Commissioner of Income-
Tax-I, Madurai.

3.The Deputy Commissioner
of Income-tax, Company Circle-1,
Madurai-2.

4.The Commissioner of INcome TAx,
Madurai.

1 cc to m/s pushya sitaraman, sr.s.c. for IT dept. sr no 52105

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